Harlan, John Marshall.

Mr. Justice Harlan Dissents!

A STATEMENT

By THE VIRGINIA COMMISSION ON CONSTITUTIONAL GOVERNMENT

THE decision of the United States Supreme Court in *Mapp* v. *Ohio,* rendered on June 19, 1961, is another in a long series of opinions that reflect the willingness of that Court to whittle away the reserved powers of the States. This time, the effect of the Court's judgment was to diminish the States' power to regulate their own court procedures.

Until this opinion came down, the Court had been careful to observe a constitutional distinction between *Federal* courts and *State* courts in the matter of evidence admitted in criminal trials. Over a period of years, the Court had ruled that evidence obtained by unlawful search could not be admitted in Federal courts; but just as consistently, the Court had ruled that it was up to the States themselves to decide whether evidence so obtained could be admitted in their own State courts.

Such a distinction is historic in the structure of American government. The Constitution lays certain prohibitions upon the Federal government, certain prohibitions upon the States, and certain prohibitions upon both. Implicit in the whole concept of federalism is this dual system of government—the States on the one hand, the central government on the other, each at liberty to formulate its own rules as to problems that are constitutionally its concern.

The power to fix rules for criminal trials in State courts always has been regarded as a State prerogative. In the exercise of this power, about half the States have sanctioned the admission of evidence obtained by unauthorized searches. About half have not. If these rules are to be changed, the States should change them on their own.

By the same token, the power to fix rules for criminal trials in

Federal courts always has been regarded as a Federal prerogative. No one questions the authority of the Supreme Court to rule that the Fourth Amendment to the Constitution compels the exclusion in Federal tribunals of evidence obtained unlawfully. If the people of the nation wish to change this procedure, they should act through Congress or by constitutional amendment.

This arrangement has kept governmental responsibility where it should be kept—close to the people governed. If the citizens of Ohio choose to permit the use of illegally obtained evidence in criminal trials, they are the ones who suffer when Ohio police abuse their authority. When the citizens of Ohio decide that it is best for the courts of their State to exclude such evidence, theirs is the responsibility to make the change. A sounder theory of self-government could not be advanced.

Nevertheless, a divided Supreme Court on June 19 changed all this. Despite long-standing precedent to the contrary, the Court ruled that the United States Constitution prohibits the States from fixing their own criminal rules in this regard. No longer, said the Court, may any of the fifty States determine its own procedures so far as unreasonable searches are concerned.

In expressing its strong protest against the Court's ruling, the Virginia Commission on Constitutional Government does not intend for a moment to condone the conduct of the police officers in this particular case. The Commission views arbitrary searches, conducted without warrants, as a flagrant violation of individual liberty. As a general public policy, the Court's new ruling is doubtless a fine thing.

That is beside the point. It is not the function of the Supreme Court of the United States to fix general public policy. This is the function of the people, acting politically, as they always act politically, within their States. There is a right way and a wrong way to go about accomplishing reforms in the administration of criminal law. And in the matter at hand, the Court took the wrong way.

The soundness of this position was ably stated in a dissenting opinion by Mr. Justice Harlan, Justices Frankfurter and Whittaker concurring. The facts in the case, briefly, were that in May of 1957, a group of Cleveland police officers broke into the apartment of a Mrs. Dollree Mapp. There was no evidence that they had a warrant. In the course of their search, they discovered several books thought to be obscene, and arrested Mrs. Mapp on a charge of

knowingly having them in her possession. The books, so seized, were admitted in evidence at her trial. There being no Ohio law prohibiting the use of such evidence, the Ohio Supreme Court affirmed her conviction. On June 19, 1961, a majority of the Supreme Court "reached out," as Mr. Justice Harlan said, to reverse the Ohio judgment. It was the Court's view that the Constitution prohibited any State from receiving such evidence in its State courts.

In Part I of his dissenting opinion, not reprinted here, Mr. Justice Harlan said that the case never should have been decided on the issue of the admissibility of the evidence. This question had not been argued or briefed before the Court. Rather, he said, the case should have turned on the validity of Ohio's law on possession of obscene materials, which presented "a constitutional question . . . both simpler and less far-reaching than the question which the Court decides today." Part II of his dissenting opinion follows.

Dollree Mapp, etc., Appellant
v.
Ohio
In the Supreme Court of the United States
June 19, 1961

MR. JUSTICE HARLAN, whom MR. JUSTICE FRANKFURTER and MR. JUSTICE WHITTAKER join, dissenting.

In overruling the *Wolf* case [Wolf v. Colorado, 338 U. S. 25 (1949), declaring that "in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure"] the Court, in my opinion, has forgotten the sense of judicial restraint which, with due regard for *stare decisis*, is one element that should enter into deciding whether a past decision of this Court should be overruled. Apart from that I also believe that the *Wolf* rule represents sounder Constitutional doctrine than the new rule which now replaces it.

[Part I omitted]

Part II

Essential to the majority's argument against *Wolf* is the proposition that the rule of *Weeks* v. *United States*, 232 U. S. 383, excluding in federal criminal trials the use of evidence obtained in violation of the Fourth Amendment, derives not from the "supervisory power" of this Court over the federal judicial system, but from Constitutional requirement. This is so because no one, I suppose, would suggest that this Court possesses any general supervisory power over the state courts. Although I entertain considerable doubt as to the soundness of this foundational proposition of the majority, cf. *Wolf* v. *Colorado*, 338 U. S., at 39-40 (concurring opinion), I shall assume, for present purposes, that the *Weeks* rule "is of constitutional origin."

At the heart of the majority's opinion in this case is the following syllogism: (1) the rule excluding in federal criminal trials evidence which is the product of an illegal search and seizure is a

"part and parcel" of the Fourth Amendment; (2) *Wolf* held that the "privacy" assured against federal action by the Fourth Amendment is also protected against state action by the Fourteenth Amendment; and (3) it is therefore "logically and constitutionally necessary" that the *Weeks* exclusionary rule should also be enforced against the States.[1]

This reasoning ultimately rests on the unsound premise that because *Wolf* carried into the States, as part of "the concept of ordered liberty" embodied in the Fourteenth Amendment, the principle of "privacy" underlying the Fourth Amendment (338 U. S., at 27), it must follow that whatever configurations of the Fourth Amendment have been developed in the particularizing federal precedents are likewise to be deemed a part of "ordered liberty," and as such are enforceable against the States. For me, this does not follow at all.

It cannot be too much emphasized that what was recognized in *Wolf* was not that the Fourth Amendment *as such* is enforceable against the States as a facet of due process, a view of the Fourteenth Amendment which, as *Wolf* itself pointed out (338 U. S., at 26), has long since been discredited, but the principle of privacy "which is at the core of the Fourth Amendment." (*Id.*, at 27.) It would not be proper to expect or impose any precise equivalence, either as regards the scope of the right or the means of its implementation, between the requirements of the Fourth and Fourteenth Amendments. For the Fourth, unlike what was said in *Wolf* of the Fourteenth, does not state a general principle only; it is a particular command, having its setting in a preexisting legal context on which both interpreting decisions and enabling statutes must at least build.

Thus, even in a case which presented simply the question of whether a particular search and seizure was constitutionally "unreasonable"—say in a tort action against state officers—we would not be true to the Fourteenth Amendment were we merely to stretch the general principle of individual privacy on a Procrustean bed of federal precedents under the Fourth Amendment. But in this instance more than that is involved, for here we are reviewing not a determination that what the state police did was constitutionally permissible (since the state court quite evidently assumed that it was not), but a determination that appellant was properly found guilty of conduct which, for present purposes, it is to be assumed the State could constitutionally punish. Since there is not the slightest suggestion that Ohio's policy is "affirmatively to sanction . . . police incursion into privacy" (338 U. S., at 28), compare *Marcus* v. *Property Search Warrant*, —, U. S. —, what the Court is now doing is to impose upon the States not only federal substantive standards of "search and seizure" but also the basic federal remedy for violation of those standards. For I think it entirely clear that the *Weeks* exclusionary rule is but a remedy which, by penalizing past official misconduct, is aimed at deterring such conduct in the future.

I would not impose upon the States this federal exclusionary remedy. The reasons given by the majority for now suddenly turning its back on *Wolf* seem to me notably unconvincing.

First, it is said that "the factual grounds upon which *Wolf* was based" have since changed, in that more States now follow the *Weeks* exclusionary rule than was so at the time *Wolf* was decided. While that is true, a recent survey indicates that at present one half of the States still adhere to the common-law non-exclusionary rule, and one, Maryland, retains the rule as to felonies.

Berman and Oberst, Admissibility of Evidence by an Unconstitutional Search and Seizure, 55 N. W. L. Rev. 525, 532-533. But in any case surely all this is beside the point, as the majority itself indeed seems to recognize. Our concern here, as it was in *Wolf*, is not with the desirability of that rule but only with the question whether the States are Constitutionally free to follow it or not as they may themselves determine, and the relevance of the disparity of views among the States on this point lies simply in the fact that the judgment involved is a debatable one. Moreover, the very fact on which the majority relies, instead of lending support to what is now being done, points away from the need of replacing voluntary state action with federal compulsion.

The preservation of a proper balance between state and federal responsibility in the administration of criminal justice demands patience on the part of those who might like to see things move faster among the States in this respect. Problems of criminal law enforcement vary widely from State to State. One State, in considering the totality of its legal picture, may conclude that the need for embracing the *Weeks* rule is pressing because other remedies are unavailable or inadequate to secure compliance with the substantive Constitutional principle involved. Another, though equally solicitous of Constitutional rights, may choose to pursue one purpose at a time, allowing all evidence relevant to guilt to be brought into a criminal trial, and dealing with Constitutional infractions by other means. Still another may consider the exclusionary rule too rough and ready a remedy in that it reaches only unconstitutional intrusions which eventuate in criminal prosecution of the victims. Further, a State after experimenting with the *Weeks* rule for a time may, because of unsatisfactory experience with it, decide to revert to a nonexclusionary rule. And so on. From the standpoint of Constitutional permissibility in pointing a State in one direction or another, I do not see at all why "time has set its face against" the considerations which led Mr. Justice Cardozo, then chief judge of the New York Court of Appeals, to reject for New York in *People* v. *Defore*, 242 N. Y. 13, the *Weeks* exclusionary rule. For us the question remains, as it has always been, one of state power, not one of passing judgment on the wisdom of one state course or another. In my view this Court should continue to forebear from fettering the States with an adamant rule which may embarrass them in coping with their own peculiar problems in criminal law enforcement.

Further, we are told that imposition of the *Weeks* rule on the States, makes "very good sense," in that it will promote recognition by state and federal officials of their "mutual obligation to respect the same fundamental criteria" in their approach to law enforcement, and will avoid " 'needless conflict between state and federal courts.' " Indeed the majority now finds an incongruity in *Wolf's* discriminating perception between the demands of "ordered liberty" as respects the basic right of "privacy" and the means of securing it among the States. That perception, resting both on a sensitive regard for our federal system and a sound recognition of this Court's remoteness from particular state problems, is for me the strength of that decision.

An approach which regards the issue as one of achieving procedural symmetry or of serving administrative convenience surely disfigures the boundaries of this Court's functions in relation to the state and federal courts. Our role in promulgating the *Weeks* rule and its extensions in such cases as *Rea*, *Elkins*, and *Rios*[2]

was quite a different one than it is here. There, in implementing the Fourth Amendment, we occupied the position of a tribunal having the ultimate responsibility for developing the standards and procedures of judicial administration within the judicial system over which it presides. Here we review state procedures whose measure is to be taken not against the specific substantive commands of the Fourth Amendment but under the flexible contours of the Due Process Clause. I do not believe that the Fourteenth Amendment empowers this Court to mould state remedies effectuating the right to freedom from "arbitrary intrusion by the police" to suit its own notions of how things should be done, as, for instance the California Supreme Court did in *People* v. *Cahan*, 44 Cal. 2d 434, with reference to procedures in the California courts or as this Court did in *Weeks* for the lower federal courts.

A state conviction comes to us as the complete product of a sovereign judicial system. Typically a case will have been tried in a trial court, tested in some final appellate court, and will go no further. In the comparatively rare instance when a conviction is reviewed by us on due process grounds we deal then with a finished product in the creation of which we are allowed no hand; and our task, far from being one of overall supervision, is, speaking generally, restricted to a determination of whether the prosecution was constitutionally fair. The specifics of trial procedure, which in every mature legal system will vary greatly in detail, are within the sole competence of the States. I do not see how it can be said that a trial becomes unfair simply because a State determines that evidence may be considered by the trier of fact, regardless of how it was obtained, if it is relevant to the one issue with which the trial is concerned, the guilt or innocence of the accused. Of course, a court may use its procedures as an incidental means of pursuing other ends than the correct resolution of the controversies before it. Such indeed is the *Weeks* rule, but if a State does not choose to use its courts in this way, I do not believe that this Court is empowered to impose this much-debated procedure on local courts, however efficacious we may consider the *Weeks* rule to be as a means of securing Constitutional rights.

Finally, it is said that the overruling of *Wolf* is supported by the established doctrine that the admission in evidence of an involuntary confession renders a state conviction constitutionally invalid. Since such a confession may often be entirely reliable, and therefore of the greatest relevance to the issue of the trial, the argument continues, this doctrine is ample warrant in precedent that the way evidence was obtained, and not just its relevance, is constitutionally significant to the fairness of a trial. I believe this analogy is not a true one. The "coerced confession" rule is certainly not a rule that any illegally obtained statements may not be used in evidence. I would suppose that a statement which is procured during a period of illegal detention, *McNabb* v. *United States*, 318 U. S. 332, is, as much as unlawfully seized evidence, illegally obtained, but this Court has consistently refused to reverse state convictions resting on the use of such statements. Indeed it would seem the Court laid at rest the very argument now made by the majority when in *Lisenba* v. *California*, 314 U. S. 219, a state coerced confession case, it said (at 235):

> "it may be assumed that [the] treatment of the petitioner [by the police] . . . deprived him of his liberty without due process and that the petitioner would have been afforded preventive relief if he could have gained access to a court to seek it.
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> "But illegal acts, as such, committed in the course of obtaining a confession . . . do not furnish an answer to the Constitutional question we must decide . . . . The gravamen of his complaint is the unfairness of the *use* of his confessions, and what occurred in their procurement is relevant only as it bears on that issue." (Emphasis supplied.)

The point, then, must be that in requiring exclusion of an involuntary statement of an accused, we are concerned not with an appropriate remedy for what the police have done, but with something which is regarded as going to the heart of our concepts of fairness in judicial procedure. The operative assumption of our procedural system is that "ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the continent whereby the accused was interrogated for hours on end." *Watts* v. *Indiana*, 338 U. S. 49, 54. See *Rogers* v. *Richmond*, 365 U. S. 534, 541. The pressures brought to bear against an accused leading to a confession, unlike an unconstitutional violation of privacy, do not, apart from the use of the confession at trial, necessarily involve independent Constitutional violations. What is crucial is that the trial defense to which an accused is entitled should not be rendered an empty formality by reason of statements wrung from him, for then "a prisoner . . . [has been] made the deluded instrument of his own conviction." 2 Hawkins, Pleas of the Crown (8th ed., 1824), c. 46, § 34. That this is a *procedural right*, and that its violation occurs at the time his improperly obtained statement is admitted at trial, is manifest. For without this right all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police.

This, and not the disciplining of the police, as with illegally seized evidence, is surely the true basis for excluding a statement of the accused which was unconstitutionally obtained. In sum, I think the coerced confession analogy works strongly *against* what the Court does today.

In conclusion, it should be noted that the majority opinion in this case is in fact an opinion only for the *judgment* overruling *Wolf*, and not for the basic rationale by which four members of the majority have reached that result. For my Brother BLACK is unwilling to subscribe to their view that the *Weeks* exclusionary rule derives from the Fourth Amendment itself, (see *ante*, p. ——), but joins the majority opinions on the premise that its end result can be achieved by bringing the Fifth Amendment to the aid of the Fourth (see *ante*, p. ——). On that score I need only say that whatever the validity of the "Fourth-Fifth Amendment" correlation which the *Boyd* case (116 U. S. 616) found, see 8 Wigmore, Evidence (3d ed. 1940), § 2184, we have only very recently again reiterated the long established doctrine of this Court that the Fifth Amendment privilege against self-incrimination is not applicable to the States. See *Cohen* v. *Hurley*, —— U. S. ——.

I regret that I find so unwise in principle and so inexpedient in policy a decision motivated by the high purpose of increasing respect for Constitutional

rights. But in the last analysis I think this Court can increase respect for the Constitution only if it rigidly respects the limitations which the Constitution places upon it, and respects as well the principles inherent in its own processes. In the present case I think we exceed both, and that our voice becomes only a voice of power, not of reason.

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[1] Actually, only four members of the majority support this reasoning. See, p. ——, *infra.*

[2] *Rea* v. *United States,* 350 U. S. 214; *Elkins* v. *United States,* 364 U. S. 206; *Rios* v. *United States,* 364 U. S. 253.

Extra copies of this statement may be obtained on request to the Virginia Commission on Constitutional Government, Travelers Building, Richmond, Virginia.